

Before the
Federal Communications Commission
Washington, D.C. 20554

AUG 12 2002

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Bethel Springs, Martin, Tiptonville,
Trenton, and South Fulton, Tennessee)

MM Docket No. 99-196
RM-9619
RM-9874

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 2002

Released: August 2, 2002

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for reconsideration of a *Report and Order* ("R&O")¹ in this proceeding, filed by Thunderbolt Broadcasting Company ("Thunderbolt"), licensee of Station WCMT-FM, Channel 269A, Martin, Tennessee.² No oppositions or replies were filed. However, after the pleading cycle ended, Thunderbolt filed a supplement to petition for reconsideration and a request for leave to file the supplementary pleading.³

BACKGROUND

2. This proceeding began with the filing of a rulemaking petition by Sherry A. Brown ("Brown"), requesting the allotment of Channel 249A at Bethel Springs, Tennessee, as a first local aural service. A *Notice of Proposed Rule Making* ("NPRM")⁴ was subsequently released, proposing the Bethel Springs allotment.

3. In response to the NPRM, Thunderbolt filed a counterproposal,⁵ seeking to upgrade and change the community of license of its Station WCMT-FM, Channel 269A, Martin, TN, pursuant to the provisions of Sections 1.420(g)(3) and (I) of the Commission's Rules.⁶ Specifically, Thunderbolt

¹ *Bethel Springs, TN, et al. (Report and Order)*, 16 FCC Rcd 20329 (Allocations Br. 2001).

² Public Notice of the filing of the petition for reconsideration was given on February 1, 2002, Report No. 2529, Mimeo No. 28653.

³ We will grant the motion and accept the supplement because it will facilitate resolution of this case based upon a full and complete factual record without prejudicing any other party.

⁴ *Bethel Springs, TN, et al. (Notice of Proposed Rule Making)*, 14 FCC Rcd 8250 (Allocations Br. 1999).

⁵ The counterproposal (RM-9874) was placed on Public Notice on May 15, 2000, Report No. 2411, Mimeo No. 99270.

⁶ Section 1.420(g)(3) of the Rules provides in pertinent part that the license or construction permit for an FM station may be modified to a mutually exclusive, higher class adjacent or co-channel in the same community. Likewise, Section 1.420(i) permits the modification of a station's authorization to specify a new community of

(continued....)

proposed the substitution of Channel 267C3 for Channel 269A at Martin, TN, the reallocation of Channel 267C3 from Martin to South Fulton, TN, as a first local service, and the modification of WCMT-FM's license accordingly. To accommodate this counterproposal, Thunderbolt proposed two allotment plans. Option I proposed (1) the downgrade of vacant Channel 267C3 at Tiptonville, TN to Channel 247A and (2) the substitution of Channel 249C3 for Channel 248C3 at Trenton, TN, and the modification of the license for Station WTNE-FM, Trenton, to specify operation on Channel 249C3. Option II proposed (1) the substitution of Channel 247C3 for vacant Channel 267C3 at Tiptonville, TN; (2) the substitution of Channel 249C3 for Channel 248C3 at Trenton, TN, and the modification of the license for Station WTNE-FM accordingly; (3) the substitution of Channel 228A for Channel 247A at Marble Hill, Missouri, and the modification of the construction permit for Station KBGJ(FM), Marble Hill, to specify operation on Channel 228A; and (4) a change of the transmitter site for Station KGKS(FM), Channel 230C3, Scott City, Missouri.⁷

4. The *R&O* dismissed Brown's rulemaking petition and did not make an allotment at Bethel Springs because the petitioner had not submitted a timely, continuing expression of interest in the allotment.⁸ Likewise, the *R&O* did not grant Thunderbolt's counterproposal to upgrade and reallocate its Martin station to South Fulton. Specifically, the *R&O* noted that "Option I is a proposal similar to the one denied in the *Report and Order* in MM Docket 96-204"⁹ and that reconsideration had been denied in that proceeding. The *R&O* then denied Option I for essentially the same reasons that reconsideration had been denied in MM Docket 96-204 -- that is, "this option requires the downgrade of vacant Channel 267C3 at Tiptonville, Tennessee, and there are expressions of interest for the Class C3 channel."¹⁰ In addition, the *R&O* stated that Option I could not be granted because the petitioner did not obtain the consent of the applicants to downgrade this vacant channel. The *R&O* also dismissed Option II because it was not "technically correct" at the time it was filed as required under our precedent.¹¹ Specifically, the proposed substitution of Channel 228A at Marble Hill, Tennessee, was short-spaced to Station KGKS (FM), Channel 230C3, Scott City, Missouri, requiring the latter station to change its transmitter site. Since the Commission will not require a station to change its transmitter site to accommodate a rulemaking proposal and since consent to change the transmitter site was not obtained from the Scott City station by the comment deadline or during this proceeding, Option II was defective and thus dismissed.

(...continued from previous page)

license without affording other interested parties an opportunity to file competing expressions of interest, provided that the existing and proposed allotments are mutually exclusive.

⁷ Thunderbolt's counterproposal was mutually exclusive with the *NPRM's* proposal because the proposed substitution of Channel 249C3 at Trenton, TN, conflicted with the proposed allotment of Channel 249A at Bethel Springs under the Commission's minimum distance separation requirements, Section 73.207 of the Commission's Rules. Specifically, the required spacing is 142 kilometers, and the actual spacing is 92.7 kilometers.

⁸ *Bethel Springs, TN, et al. (Report and Order)*, 6 FCC Rcd at 20330. The *R&O* also relied upon three other procedural violations as follows: (1) the late-filed expression of interest was not accompanied by a separate motion for late acceptance; (2) the comments were not properly filed through the Secretary's office; and (3) there was no evidence that the pleading was served on the counterproponent, Thunderbolt. No petition for reconsideration of the dismissal of the Bethel Springs rulemaking petition was filed.

⁹ *Id.*

¹⁰ *Id.* at 20331.

¹¹ See, e.g., *Broken Arrow and Bixby, OK*, 3 FCC Rcd 6507, 6511 (Policy and Rules Div. 1988) (supplemental comments not accepted to correct deficiencies in a counterproposal because counterproposals must be technically correct at the time of their filing); *Springdale, Arkansas, Carthage, Aurora and Willard, Missouri*, 4 FCC Rcd 674 (Allocations Br. 1989), *recon.*, 5 FCC Rcd 1241 (Policy and Rules Div. 1990) (counterproposals must be technically correct and substantially complete when filed).

PETITION FOR RECONSIDERATION

5. Thunderbolt does not contest the dismissal of Option II of its counterproposal. Rather, Thunderbolt seeks reconsideration of the denial of Option I, arguing that an error of fact in the *R&O* justifies reversal. In support of this position, Thunderbolt contends that the *R&O* improperly assumed that there are applicants for the Tiptonville allotment from which consent to the downgrade had to be obtained. Thunderbolt asserts that there are no applicants for this vacant allotment and that, under these circumstances, Option I can be granted.

6. Alternatively, Thunderbolt argues that, even if the *R&O* mislabeled the expressions of interest that had been filed by two other parties for a Channel 269C3 allotment at Tiptonville in MM Docket 96-204 as "applications," the facts of the instant case are different from MM Docket 96-204 and justify a grant of its change of community proposal. In the earlier case, Thunderbolt asserts that its proposal to upgrade its Martin station was denied because it required the deletion of the vacant allotment at Tiptonville and because Commission policy generally prohibits the deletion of a vacant allotment in which an interest has been expressed. By way of comparison, Thunderbolt argues that Option I merely proposed the substitution of a lower class channel at Tiptonville. Further, Thunderbolt argues that the public interest benefits of Option I in the instant case are greater than those in its proposal denied in MM Docket 96-204 because Option I will trigger a higher FM allotment priority.¹² In this regard, Thunderbolt alleges that Option I will provide a first local service to South Fulton under Priority (3) while its proposal in MM Docket 96-204 would provide an upgrade in service at Martin under Priority (4), other public interest matters.

7. In its supplement to petition for reconsideration, Thunderbolt points out that subsequent to the commencement date of this proceeding, it had acquired a majority interest in Station WTNE-FM, Channel 249C3, Trenton, TN,¹³ and that since the date of the filing of the petition for reconsideration, Station WTNE-FM filed a minor change application seeking a one-step upgrade from its current Channel 248C3 to Channel 249C2. As a result, the licensee of Station WTNE-FM consents to Thunderbolt's proposed substitution of Channel 249C3 for Channel 248C3 at Trenton, thus obviating the need for the issuance of an Order to Show Cause to Station WTNE-FM on this proposed channel change.

DISCUSSION

8. After a careful review of the record in this proceeding, we agree that Option I should not have been denied, and we will, therefore, reconsider this option on the merits herein. We base this decision upon two reasons. First, further examination of Commission records reveals that there were no applications pending for vacant Channel 267C3, Tiptonville, and that the consent of applicants was thus not needed in order to consider downgrading this vacant allotment. Indeed, in 1995, the staff cancelled a construction permit for Station WAAT (FM), Channel 267C3, Tiptonville, for failure to meet the criteria for extension of the permit¹⁴ and later denied a petition for reconsideration of that action.¹⁵ No filing window was subsequently opened for this channel, and no auction has been held for this allotment.

¹² The FM allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

¹³ Specifically, Thunderbolt reports that it now controls 77.6% of Station WTNE-FM.

¹⁴ WAAT (FM), Tiptonville, Staff ruling of October 27, 1995, regarding BMPH-940915JA (extension); BM"PH-940922IC (modification); and BPH-920717MA (permit).

¹⁵ Staff ruling of July 31, 1996.

9. Second, we agree that the facts of the instant case are different from those in MM Docket No. 96-204 and, as discussed below, warrant reexamination of Option I. Specifically, in MM Docket No. 96-204, Thunderbolt proposed to upgrade its Station WCMT-FM, Martin, TN, by substituting Channel 267C3 for Channel 269A at Martin. To accommodate this upgrade, Thunderbolt initially proposed to delete vacant Channel 267C3 at Tiptonville. Thereafter, Thunderbolt offered an alternate allotment plan, requesting that the proposed upgrade of its Martin station be accomplished by the downgrade of Channel 267C3 at Tiptonville to Channel 247A and the substitution of equivalent class Channel 249C3 for Channel 248C3 for Station WVEZ (FM), Trenton, Tennessee. The *Report and Order* denied the initial proposal because two parties had filed expressions of interest in retaining Channel 267C3 at Tiptonville and because Commission policy is not to delete a channel in which interest is expressed unless there are compelling public interest reasons.¹⁶ The *Report and Order* then denied the alternate allotment plan because the public interest benefits of the upgrade at Martin did not outweigh downgrading the vacant Class C3 allotment at Tiptonville. These actions were affirmed in a *Memorandum Opinion and Order* in which it was further pointed out that the downgrade of Channel 267C3 at Tiptonville was not warranted because, on a comparative basis, the Class C3 allotment at Tiptonville would serve a greater population than a station operating on Channel 267C3 at Martin.¹⁷

10. The facts of the instant case are different from those in MM Docket No. 96-204 in several respects. First, unlike Docket No. 96-204, no deletion of Channel 267C3 at Tiptonville was proposed. Rather, Thunderbolt proposed a downgrade of the Tiptonville allotment in Option I of the instant case or, alternatively, the substitution of an equivalent class channel at Tiptonville in Option II. Second, no formal expressions of interest were filed in the instant case by parties stating that they will apply for only the vacant Class C3 channel at Tiptonville.¹⁸ Third, Option I of Thunderbolt's counterproposal in the instant proceeding was not examined on its merits whereas Thunderbolt's alternate allotment plan in MM Docket No. 96-204 involving the same downgrade at Tiptonville was analyzed on the merits. Fourth, as will be discussed below, Thunderbolt is proposing in the instant case an upgrade and change of community of license for its Martin station that would result in a first local service under allotment priority (3) whereas it proposed in MM Docket No. 96-204 only an upgrade of its Martin station that triggered the less important allotment priority (4), other public interest matters. In view of these differences, we believe that it is appropriate to reexamine Thunderbolt's Option I in the instant proceeding.

11. As a threshold matter, we note that Option I of Thunderbolt's counterproposal in the instant docket is no longer mutually exclusive because Brown's rulemaking proposal to allot Channel 249A at Bethel Springs was dismissed and because no request was filed for reconsideration of that action. As a result, no comparison is necessary between Brown and Thunderbolt's proposals. Rather, we must reexamine Option I of Thunderbolt's counterproposal to determine if the upgrade and change of community of license would result in a preferential arrangement of allotments by comparing the existing and proposed arrangement of allotments under the FM allotment priorities.

12. Before making this comparison, we find that South Fulton is a "community" for allotment

¹⁶ *Martin, Tiptonville, and Trenton, TN, (Report and Order)*, 13 FCC Rcd 17767 (Allocations Br. 1998).

¹⁷ *Martin, Tiptonville, and Trento., TN (Memorandum Opinion and Order)*, 15 FCC Rcd 12747 (Allocations Br. 2000).

¹⁸ We do recognize, however, that one of the parties that had filed a defective expression of interest for vacant Channel 267C3 at Tiptonville in MM Docket No. 96-204 filed two pleadings in the instant proceeding, requesting that the staff take official notice of both the *R&O* and *MO&O* in MM Docket No. 99-196. No language was included, renewing the expression of interest or stating that this party would file an application for Channel 267C3. To the extent that this request for official notice could be viewed as an expression of interest, we will address this matter *infra* at para. 15.

purposes. This requirement is generally satisfied if the community is either incorporated or listed in the U.S. Census.¹⁹ In the instant case, South Fulton, Tennessee is incorporated, with a 2000 U.S. Census population of 2,517. Thunderbolt has also demonstrated that South Fulton is self-governing, with its own mayor, local government, police department, fire department, local businesses, and churches.

13. In comparing the existing and proposed arrangement of allotments, we find that retaining Station WCMT-FM at Martin, Tennessee, on Channel 269A would trigger priority (4), other public interest matters, because the station would continue to provide that community with a second local service. In this regard, we note that Station WCMT-AM is already licensed to Martin. By way of comparison, the reallocation and upgrade of Station WCMT-FM to South Fulton, Tennessee, on Channel 267C3 would trigger priority (3) because the station would provide a first local service to South Fulton.²⁰ In addition, the upgrade will result in a gain of service to 25,075 persons; and, since the 60 dBu contour of Station WCMT-FM on Channel 269A at Martin is entirely contained in the 60 dBu contour of the proposed upgraded facilities of WCMT-FM, there will be no loss of service.

14. While the proposed arrangement of allotments would trigger a higher allotment priority, we also recognize that it would necessitate the downgrade of vacant Channel 267C3 at Tiptonville to Channel 247A. Nevertheless, we believe that it would be in the public interest to downgrade this channel for several reasons. First, in order to downgrade a vacant channel, there must be an interest expressed in the downgraded channel, and a valid expression of interest in Channel 247A was submitted by Thunderbolt, stating that it will file an application for Channel 247A at Tiptonville when allotted, and when authorized, promptly build a facility. Second, no formal expression of interest was submitted in this proceeding by any party, either opposing the downgrade or explicitly indicating that it had an interest in applying for vacant Channel 267C3 and also building a station if its application were granted.

15. Third, even if we were to consider Hailey's requests that we take official notice of the *Report and Order* and the *Memorandum Opinion and Order* in MM Docket No. 96-204 as the functional equivalents of an expression of interest in retaining Channel 267C3 at Tiptonville, we still believe that it would be in the public interest to downgrade the Tiptonville allotment because the public interest benefit of providing a first local service to South Fulton outweighs downgrading the channel. This is due to the fact that Thunderbolt's Option I triggers one of the higher FM allotment priorities – that is, a first local service under priority (3). While we do recognize that a Class C3 facility at Tiptonville would serve 60,463 more people within its 1 mV/m contour than a Class A facility, a station on the downgraded channel would still provide a first local service to Tiptonville. Also, this downgrade will not result in an actual loss of service because the channel is vacant, and we have downgraded a vacant allotment to accommodate a rulemaking proposal.²¹ Accordingly, we will grant Option I of Thunderbolt's counterproposal.²²

¹⁹ See, e.g., *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 101 (1982); and *Cleveland and Ebenezer, MS*, 10 FCC Rcd 8807, 8808 (Allocations Br. 1995).

²⁰ South Fulton is not located in any Urbanized Area as defined by the U.S. Census and will not provide 1mV/m service to any Urbanized Area. Accordingly, no *Huntington and Tuck* analysis is warranted.

²¹ See, e.g. *Othello, Washington*, 6 FCC Rcd 6476 (Allocations Br. 1991) (vacant channel downgraded to accommodate an upgrade for another station).

²² Channel 267C3 can be allotted at South Fulton, TN, at reference coordinates 36-26-27 and 88-58-00. Channel 247A can be substituted for Channel 267C3 at Tiptonville, TN, at reference coordinates 36-22-42 and 89-23-18. Finally, Channel 249C3 can be substituted for Channel 248C3 at Trenton, TN, and Station WTNE-FM's license modified accordingly at reference coordinates 36-05-10 and 88-54-39. In accordance with *Circleville, OH*, 8 FCC Rcd 159 (1967), Thunderbolt has stated its intention to reimburse the licensee of Station WTNE-FM (formerly WWEZ (FM)), Trenton, TN for the reasonable costs of changing frequencies. We also note that Thunderbolt now controls the licensee of the Trenton station.

16. Pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective September 16, 2002, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Martin, Tennessee	--
South Fulton, Tennessee	267C3
Tiptonville, Tennessee	247A
Trenton, Tennessee	249C3

17. IT IS FURTHER ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, the license of Thunderbolt Broadcasting Company for Station WCMT-FM IS MODIFIED to specify operation on Channel 267C3, South Fulton, Tennessee, in lieu of Channel 269A, Martin, Tennessee, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gibson County Broadcasting Company, Inc., for Station WTNE-FM, Trenton, Tennessee, IS MODIFIED to specify operation on Channel 249C3 in lieu of Channel 248C3, subject to the following conditions:

- (a) Nothing contained herein shall be construed as authorizing any change in Station WTNE-FM's license, BLH-19930406KE, except the channel specified above. Any changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301), specifying the new facility.
- (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules provided the transmission facilities comply in all respects with license BLH-19930406KE, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

19. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Thunderbolt Broadcasting Company, licensee of Station WCMT-FM, is required to submit a rulemaking fee in addition to the fee required for the applications to effect the change in community of license and upgrade.

20. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Memorandum Opinion and Order by Certified Mail, Return Receipt Requested, to the following:

Gibson County Broadcasting Company, Inc.
Thunderbolt Broadcasting Company
P.O. Box 318
Martin, Tennessee 38237

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Andrew J. Rhodes, Audio Division, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau